State v. Perank: Is the Uintah-Ouray Reservation "Nailed Down Upon the Border"?

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I. INTRODUCTION

Part of the Uintah-Ouray Reservation in northeastern Utah was opened for non-Indian settlement in 1905. In 1985 the Tenth Circuit ruled that the boundaries of this reservation were not changed by the acts which made tribal lands available for sale to non-Indian settlers. In contrast, in 1992 the Utah Supreme Court held that the reservation boundaries had been diminished by these acts and that a state trial court had criminal jurisdiction over a crime committed by an Indian on non-Indian land within the original boundaries of the reservation.

This note examines the Utah Supreme Court decision in State v. Perank. Part II provides a brief historical background of the federal government's policy regarding allotment of tribal lands and also summarizes the Tenth Circuit's 1985 decision.

1. Editor's note: On November 25, 1992, the Utah Supreme Court ordered that an "issuance of remittitur [in State v. Perank] be stayed pending (1) the conclusion of any proceedings on certiorari in the United States Supreme Court in [State v. Perank] or State v. Hagen, 191 Utah Adv. Rep. 26 ([] July 17, 1992), and (2) the final disposition of the injunction proceeding pending in the United States District Court for the District of Utah, Ute Indian Tribe v. State of Utah, et al., Civil No. C75-408." As of the date of publication, Perank has not been published in the official reporter. Although the opinion is subject to revision prior to final publication, the Editors have determined to publish this note because the question of whether the Uintah-Ouray Reservation was diminished is timely and because the general analysis regarding diminishment of reservations is pertinent and meaningful.

2. In 1903, Bureau of Indian Affairs Inspector James McLaughlin solicited the consent of the Ute Indians to allotment of tribal lands. He explained to the Indians:

You say that line is very heavy and that the reservation is nailed down upon the border. That is very true as applying to the past many years and up to now, but Congress has provided legislation which will pull up the nails which hold down that line and after next year there will be no outside boundary line to this reservation.


Part III gives a synopsis of Perank's facts and examines the court's reasoning. Part IV analyzes the decision by using the analytical structure set forth by the Supreme Court in Solem v. Bartlett\(^5\) and by focusing on the differences between Perank and the Tenth Circuit decision. This note concludes that the Perank decision was correct because the express language of the statutes which opened the Uintah Reservation for non-Indian settlement demonstrates congressional intent to diminish the reservation boundaries and because the disputed lands have lost their Indian character.

II. BACKGROUND

A. The Allotment Policy

Federal Indian policy shifted significantly in the latter part of the nineteenth century.\(^6\) In 1887 the federal government turned away from its prior policy of communally owned tribal reservations and adopted a policy of allotting separate parcels of tribally held lands to individual members. The concept underlying this policy was "to lure the nomadic tribes away from their communal village existence and to encourage a sedentary, rural agricultural life on separate allotments."\(^7\) Congress passed several pieces of legislation in support of this policy which opened specific reservations for allotment and made the surplus lands available to non-Indian settlers.\(^8\)

The failure of Congress to dictate precise boundary chang-

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7. Id. at 148. The General Allotment Act of 1887 (Dawes Act) authorized the President to allot parcels of reservation lands to Indians and to sell the unallotted lands to non-Indians. 25 U.S.C. § 331 (1988). "In view of the discretionary nature of this presidential power, Congress occasionally enacted special legislation in order to assure that a particular reservation was in fact opened to allotment." Mattz v. Arnett, 412 U.S. 481, 497 (1973). The openings of specific reservations for allotment were governed by 108 separate pieces of legislation.

Some of the acts provided for the outright cession of the unallotted lands; some provided for a cession in trust; some provided that the unallotted lands would be "restored to the public domain" or to status as "public lands;" other acts simply provided that the unallotted lands would be opened for settlement . . . .

es as it opened the various reservations has created a modern jurisdictional quandary.\textsuperscript{9} State courts have limited criminal jurisdiction in Indian country.\textsuperscript{10} If a crime is committed by or against an Indian in Indian country, jurisdiction is federal or tribal.\textsuperscript{11} The only time that a state clearly has jurisdiction over a crime committed in Indian country is when both the defendant and the victim are non-Indians.\textsuperscript{12} Thus, knowing the boundaries of Indian country is essential to resolving any criminal jurisdictional issue.

Since 1948, "Indian country" has been defined by statute as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent."\textsuperscript{13} Whether land constitutes Indian country under this definition turns on whether it is located within the boundaries of an Indian reservation. Moreover, once established, a reservation remains Indian country until it is terminated by Congress; the mere sale of reservation land to non-Indians does not remove the land from the reservation for jurisdictional purposes.\textsuperscript{14} As a result, modern

\textsuperscript{9} Congress did not focus on the precise boundaries of the reservations which were opened for allotment because it was commonly assumed that all reservations would be abolished as the culmination of the allotment policy. See Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 624-25 (1977) (Marshall, J., dissenting). During the time the allotment policy was being implemented, Indian country as a jurisdictional concept was defined as including only lands held under Indian title. See, e.g., Bates v. Clark, 95 U.S. 204, 208 (1877). This title-dependent definition was later expanded to include all lands within the boundaries of an Indian reservation regardless of title. Solem v. Bartlett, 465 U.S. 463, 468 (1984).

\textsuperscript{10} Congress has granted certain states, including Kansas, North Dakota and Iowa, concurrent criminal jurisdiction over Indian reservations. See Negonsott v. Samuels, 61 U.S.L.W. 4185, 4186 (U.S. Feb. 24, 1993).


\textsuperscript{12} United States v. McBratney, 104 U.S. 621, 624 (1881); see generally FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 34-38, 286-304, 335-41 (Rennard Strickland et al. eds., 1982); Robert N. Clinton, Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze, 18 ARIZ. L. REV. 503 (1976).

\textsuperscript{13} 18 U.S.C. § 1151(a) (1988). A patent is the instrument by which the federal government grants public lands to an individual. BLACK'S LAW DICTIONARY 1125 (6th ed. 1990). The statute also defines Indian country as "all dependent Indian communities within the borders of the United States . . . , and . . . all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." 18 U.S.C. § 1151(b)-(c) (1988).

\textsuperscript{14} Clinton, supra note 12, at 513. The question has frequently arisen whether an act of Congress which opened reservation land for sale to non-Indians has diminished the boundaries of a reservation, thereby removing the land from Indian country for jurisdictional purposes. See, e.g., Solem v. Bartlett, 465 U.S. 463 (1984); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); DeCoteau v. District County Court, 420 U.S. 425 (1975); Mattz v. Arnett, 412 U.S. 481 (1973); Seymour v. Su-
criminal jurisdictional questions are resolved by determining whether Congress intended to reduce or diminish a reservation's boundaries by passing a particular act, even though at the time the distinction seemed unimportant. Thus, the terms of the statutes which opened the particular reservation for settlement must be examined to determine whether Congress intended to diminish the reservation boundaries.

B. Ute Indian Tribe v. Utah

In 1975 the Ute Indian Tribe enacted and published a Law and Order Code which purported to exercise jurisdiction over all lands within the Uintah and Uncompahgre Reservations as they were originally created. Several municipalities and one county located within the original Uintah Reservation and the State of Utah protested, and the Ute Tribe sued for declaratory and injunctive relief to determine the present extent of tribal jurisdiction. The district court ruled that the boundaries of the Uncompahgre Reservation had been disestablished by Congress but that the boundaries of the Uintah Reservation, now called the Uintah-Ouray Reservation, had not been diminished by the acts of Congress which allotted tribal lands to tribal members and opened the unallotted lands for non-Indian settlement.

On appeal, the Tenth Circuit affirmed the district court's decision in part, but reversed the district court's holding that the Uncompahgre Reservation was disestablished. The court

18. Id. at 1078-79.
19. The district court also held that the original boundaries of the Uintah Reservation were diminished by withdrawal of an area known as the Gilsonite Strip, withdrawal of 1,010,000 acres for an addition to the adjacent national forest reserve, and withdrawal of 56,000 acres for a reclamation project. The court found that the boundaries of the Uintah-Ouray Reservation were extended in 1948 to include 510,000 acres known as the Hill Creek Extension. Id. at 1153-54.
20. Ute Indian Tribe, 773 F.2d at 1093. The Tenth Circuit also reversed the district court's holding that the Uintah reservation was diminished by the withdrawal of 1,010,000 acres of forest land. Id. A previous panel decision of the Tenth Circuit held that the unallotted lands became part of the public domain and were not, therefore, within the boundaries of the reservation. Ute Indian Tribe v. Utah, 716 F.2d 1298, 1315 (10th Cir. 1983).
noted that disestablishment or diminishment of the reservation would require a "clear expression of congressional intent to change the status of the reservation." The court found that only two situations would reveal such an intent: (1) when the act opening the reservation makes explicit reference to cession, coupled with an unconditional commitment to compensate the tribe for lost lands; or (2) when events surrounding passage of the act "reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation."

Reviewing the legislation which opened the Uintah Reservation, the court found that neither the language nor the surrounding circumstances were sufficiently clear to support a finding of congressional intent to diminish the boundaries of the Uintah Reservation. "[I]n the absence of 'substantial and compelling evidence of a congressional intention to diminish Indian lands,' the courts' 'traditional solicitude for the Indian tribes' must compel a finding that 'the old reservation boundaries survived the opening.'"

The Tenth Circuit also reviewed the language of the statute that opened the neighboring Uncompahgre Reservation and concluded that "the phrase 'restore to the public domain' [was] not the same as a congressional state of mind to disestablish" and that the "expression 'return to the public domain' [did] not reliably establish the clear and unequivocal evidence of Congress' intent to change boundaries." The court reasoned that the statutory phrase contained no explicit language of termination nor did it include an unconditional commitment to compensate the Indians for their lands.

Despite the Tenth Circuit decision in Ute Indian Tribe v. Utah, the Utah Supreme Court recently held in State v. 21. *Ute Indian Tribe*, 773 F.2d at 1088.
22. *Id.* (quoting *Solem v. Bartlett*, 465 U.S. 463, 471 (1984)).
23. *Id.* at 1089 (quoting *Solem*, 465 U.S. at 472).
24. *Id.* at 1092. (citation omitted).
25. *Id.* The status of the Uintah-Ouray Reservation lands at the end of the federal litigation was as follows: (1) the boundaries of the Uncompahgre Reservation remained as they had been established in 1882; (2) the original boundaries of the Uintah Reservation were diminished by withdrawal of a 7,040 acre tract known as the Gilsonite Strip and withdrawal of 56,000 acres for the Strawberry River reclamation project; and (3) the reservation included all of the lands allotted to the Indians and the lands reserved for tribal use under the 1905 Act, the surplus or unallotted lands which were opened to non-Indian settlement and the lands set aside for the forest reserve. *Id.* at 1089.
Perank that the phrase "restore to the public domain" as applied to the Uintah Reservation did express congressional intent to diminish the boundaries.

III. State v. Perank

During a probation revocation proceeding in a state trial court, Clinton Perank, who had pleaded guilty to burglary, asserted that the court did not have subject matter jurisdiction because he was an Indian and the offense had occurred in Indian country. The trial court rejected Perank's arguments, revoked his probation, and ordered that he serve a term in the state prison. On appeal, the Utah Supreme Court affirmed the trial court's order after determining that Myton, Utah, the site at which the burglary occurred, lies outside the boundaries of the Uintah-Ouray Reservation and, consequently, was not within Indian country. In reaching this conclusion, the Utah Supreme Court reasoned that a 1902 congressional act—as amended by subsequent acts in 1903, 1904 and 1905—restored the unallotted, unreserved lands of the Uintah Reservation to the public domain and "that the Reservation boundaries were diminished by that restoration." Accordingly, the state trial court had jurisdiction over the offense.

27. Id. at 5.
28. Id.
29. Id. at 18. The court first addressed Perank's Indian status even though the state conceded that Perank was an Indian. The court determined that Perank had a significant amount of Indian blood and that he had been recognized as an Indian by both the tribe and the federal government. He was, therefore, an Indian for the purpose of determining jurisdiction under 18 U.S.C. §§ 1152-1153. Id. at 6.
30. The Perank Court noted that the legal status of the "trust lands" of the Uintah Reservation (lands allotted to Indians or reserved for tribal use), the land which was withdrawn from the Reservation and attached to the adjoining national forest reserve, the Uncompahgre Reservation, and the land known as the Hill Creek Extension was not at issue in this case. "The only issue in this case ... is whether the unallotted and unreserved lands that were opened to entry in 1905 and not later restored to tribal ownership and jurisdiction by the 1945 'Order of Restoration' are within the present boundaries of the Reservation." Id. at 7.
31. Id. at 18. Justice Zimmerman vigorously dissented from the majority opinion, arguing that the Utah Supreme Court should defer to the decision of the Tenth Circuit under the doctrine of comity. Id. at 22-25 (Zimmerman, J., dissenting).
32. Id. at 18.
A. The Statutory Scheme

A basic understanding of the statutes that led to the opening of the Uintah Reservation is essential to comprehend the Utah Supreme Court’s decision. In 1902 Congress passed an act which provided a scheme for opening the Uintah Reservation for non-Indian settlement. This Act set October 1, 1903 as the date for allotting lands to tribal members and restoring surplus lands to the public domain. It required Indian consent to the allotment scheme and provided that lands opened for settlement would be sold for $1.25 an acre, with the proceeds used for reimbursing the United States and for the benefit of the Ute Tribe.

After learning that “the surveying necessary to make the allotments to the Indians could not be completed and Indian consent would not be forthcoming,” Congress passed another act that dealt with opening the reservation. The 1903 Act amended the 1902 Act by dispensing with the requirement of Indian consent and changing the opening date to October 1, 1904. On April 21, 1904, Congress amended the 1902 and 1903 Acts to provide for additional time to make the allotments and to open the surplus lands for entry.

Congress enacted the March 3, 1905 Act in response to a report that additional time was needed to complete the allotment process. The 1905 Act set September 1, 1905 as the new date for opening the reservation unless the President determined that it could be opened earlier; the Act also allowed the President to set aside lands for the Uintah Forest Reserve and for the protection of the Indians’ water supply.

After reviewing these statutes, the Utah Supreme Court determined that “Congress intended only to amend specific

34. Id. at 263.
35. Id. at 263-64.
40. Id.
aspects of the 1902, 1903, and 1904 Acts and . . . [e]xcept as specifically amended, Congress did not intend to change the basic features of the 1902 and 1903 Acts.\textsuperscript{41} The court stated:

After enactment of the 1905 Act, the 1902 Act remained in full force and effect with respect to (1) providing for allotments to heads of households and members of the Uintah and White River Tribes and for the amount of acreage for each allotment; (2) restoring the unallotted lands to the public domain; (3) fixing the price to be paid per acre by homesteaders; (4) providing how and to whose benefit the proceeds derived from the sale of the unallotted lands were to be applied; and (5) protecting certain mineral rights.\textsuperscript{42}

Thus, the Utah Supreme Court concluded that the 1902 Act was the basic statutory authority for opening the Uintah Reservation. The essential elements of the 1902 Act, including the operative language restoring unallotted lands to the public domain, remained in effect through the enactment of the 1905 Act.\textsuperscript{43}

B. The Effect of the Phrase “Restore to the Public Domain”

After determining that the 1902 Act was the basic statutory authority for opening the reservation, the \textit{Perank} court re-

\textsuperscript{42} \textit{Id.} (emphasis added).
\textsuperscript{43} \textit{Id.} Part of the controversy between the Tenth Circuit and Utah decisions is the determination of which act actually opened the reservation. The Tenth Circuit, in \textit{Ute Indian Tribe}, held that the terms of the Act of March 3, 1905, ch. 1479, 33 Stat. 1048, alone governed the opening of the Uintah and Ouray Reservation. \textit{Ute Indian Tribe v. Utah}, 773 F.2d 1087, 1089 (10th Cir. 1985) (en banc), \textit{cert. denied}, 479 U.S. 994 (1986). The Tenth Circuit found that this Act, which had no restoration language, did not diminish the reservation, and that the operative language of the Act of May 27, 1902, ch. 888, 32 Stat. 245, did not carry through to the opening of the reservation. \textit{Id}. The Utah Supreme Court came to the contrary conclusion, holding “that as a matter of statutory construction, the 1905 Act was merely amendatory and supplementary to the 1902 Act and therefore did not accomplish the opening of the Reservation independent of the 1902 Act.” \textit{Perank}, 191 Utah Adv. Rep. at 10. Thus, the language which provided “that unallotted reservation lands would be ‘restored to the public domain’ remained in effect when the Reservation was finally opened by a presidential proclamation in 1905.” \textit{Id}.

The Utah Supreme Court found support for its view that the 1902 Act was the operative statute for opening the Uintah Reservation in “subsequent presidential proclamations, congressional acts, executive department orders, and court decisions.” \textit{Id}. at 13. These various documents all referred to the 1902 Act as the act which authorized the allotment of tribal lands and the sale of surplus lands to non-Indians. Although essential to the \textit{Perank} decision, this issue is beyond the scope of this note and will not be examined in detail.
viewed the statute for congressional intent to diminish the reservation boundaries. The court listed several factors to determine whether Congress intended to diminish the Uintah Reservation but found it unnecessary to look further than the first and most probative factor—the language of the statutory scheme. In concluding that Congress intended to diminish the Uintah Reservation, the Perank court relied on several United States Supreme Court cases which recognize that reservation boundaries are diminished by statutory language that restores reservation lands to the public domain. The "operative statutory language" of the 1902 Act states that after members of the tribe are allotted their share of reservation lands, "unallotted lands within said reservation shall be restored to the public domain." The Perank court found this language to be persuasive evidence of congressional intent to diminish the Uintah Reservation.

IV. ANALYSIS

The conflict between the Perank court's decision and the decision of the Tenth Circuit may yet be resolved by the United States Supreme Court as a petition for certiorari has been filed in a companion case. The ramifications of the final outcome are significant, especially for law enforcement in the disputed area. With the current conflict between state and federal case law, law enforcement officials face practical difficulties in prosecuting the offenders for crimes which occur in the disput-

ed area of a reservation.

For example, if an Indian defendant is convicted under state law for a burglary\(^{49}\) committed in the disputed area, he could challenge the conviction. Under the federal court’s interpretation of federal law establishing the reservation boundaries, the disputed area is Indian country and the state court lacked jurisdiction. If the same Indian defendant committed the same criminal act but is convicted under the federal Indian Major Crimes Act,\(^{50}\) he could also challenge the conviction. Under the state court’s interpretation of federal law establishing the reservation boundaries, the disputed area is not Indian country and the federal court lacked jurisdiction. Thus, law enforcement officials need a clear delineation of state and federal jurisdiction.

The Supreme Court has attempted to clarify the law in this difficult area. In \textit{Solem v. Bartlett},\(^{51}\) the most recent Supreme Court decision to address diminishment of reservation boundaries, the Court articulated “a fairly clean analytical structure” to differentiate allotment acts that diminished reservation boundaries from those that merely allowed non-Indian settlers to own land within established reservation boundaries.\(^{52}\) This analysis is guided by the principle that only Congress can diminish the boundaries of a reservation and that all individual parcels of land within a reservation retain their reservation status, regardless of ownership, “until Congress explicitly indicates otherwise.”\(^{53}\) A corollary to this principle is that Congress must “clearly evince an ‘intent . . . to change . . . boundaries’ before diminishment will be found.”\(^{54}\)

The first factor to be considered in the \textit{Solem} analysis is the statutory language used to open the reservation lands for sale to non-Indians. The Court emphasized the significance of this factor, referring to it as “[t]he most probative evidence of congressional intent.”\(^{55}\) Intent to diminish a reservation is manifested when the statute makes “[e]xplicit reference to cession” or uses “language evidencing the present and total

\begin{footnotesize}
52. \textit{Id.} at 470.
54. \textit{Id.} (quoting \textit{Rosebud Sioux Tribe v. Kneip,} 430 U.S. 584, 615 (1977)).
55. \textit{Id.}
\end{footnotesize}
surrender of all tribal interests.\textsuperscript{56} An "almost insurmountable presumption" of congressional intent to diminish a reservation exists when the statutory language is coupled with "an unconditional commitment from Congress to compensate the Indian tribe for its opened land.\textsuperscript{57}

A second factor comes into play when the pertinent statute does not contain explicit language of cession. It will be inferred that Congress intended to diminish the reservation "[w]hen events surrounding the passage of a surplus land act . . . unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation."\textsuperscript{58} This factor focuses on "the manner in which the transaction was negotiated with the tribes involved and the tenor of the legislative Reports presented to Congress.\textsuperscript{59} Nonetheless, additional evidence of congressional intent is demonstrated by its subsequent treatment of the affected areas and by the way agencies of the executive branch and local judicial authorities dealt with the unallotted open lands.

The third factor focuses on who actually moved onto the opened reservation lands. The Solem Court stated, "[w]here non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that \textit{de facto}, if not \textit{de jure}, diminishment may have occurred."\textsuperscript{60} The following sections will analyze these three factors as applied to the Uintah Reservation to determine whether the Utah Supreme Court decision or the Tenth Circuit decision is better reasoned. This note concludes that the Utah Supreme Court decision more closely follows federal precedent.

\textbf{A. Statutory Language}

The most probative evidence of congressional intent is the language used in the legislation that opened the surplus lands of the Uintah Reservation for non-Indian settlement.\textsuperscript{61} The

\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 471.
\textsuperscript{59} Id.
\textsuperscript{60} Id. \textit{De facto} diminishment will not be used as the sole basis for finding diminishment. If neither the act opening the reservation nor its legislative history provide "substantial and compelling evidence of congressional intention to diminish Indian lands," a court will hold that no diminishment occurred. \textit{Id. at 472.}
Utah Supreme Court and the Tenth Circuit disagree as to the significance of the statutory phrase “restored to the public domain.” In Perank the Utah Supreme Court correctly held that this phrase, as used in the 1902 Act, established the necessary congressional intent to diminish the boundaries of the Uintah Reservation. In Ute Indian Tribe the Tenth Circuit interpreted the phrase as it was used in the acts which opened the Uncompahgre Reservation and determined that the phrase “mean[t] that Indian lands would be available for settlement, but that the boundaries [would] remain unchanged.” Relying in part on the fact that the phrase was not accompanied by an unconditional commitment to compensate the Indians for their lands, the Tenth Circuit concluded that the phrase “restored to the public domain” did not indicate congressional intent to diminish the Uncompahgre Reservation.

However, case law does not require both cession language and a statutory promise to compensate the Indians with a sum certain for their lands in order to establish that Congress intended to change reservation boundaries. The Supreme Court has stated that when “language of cession is buttressed by an unconditional commitment from Congress to compensate the Indian tribe for its opened land, there is an almost insurmountable presumption that Congress meant for the tribe’s reservation to be diminished.” Although a promise to pay the tribe a fixed sum for its lands reinforces cession language as an expression of congressional intent, such a promise is not the sine qua non. As the Perank court explained, “[n]o specific talismanic statutory language is required to conclude that Congress intended to diminish a reservation.”

U.S. at 470).
62. Id. at 13.
63. The Tenth Circuit did not analyze the phrase as it applied to the Uintah Reservation because it determined that the Uintah Reservation was opened by the 1905 Act alone and that the restoration language of the 1902 Act did not carry through to the opening of the Uintah Reservation. Ute Indian Tribe v. Utah, 773 F.2d 1087, 1089 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986).
64. Id. at 1092.
65. Id.
67. Perank, 191 Utah Adv. Rep. at 8 (citing Solem, 465 U.S. at 471). The court also explained that the statutory language need not “expressly sever tribal jurisdiction,” “provide for unconditional compensation or a fixed sum to be paid to the Indians,” or “provide for Indian consent” in order to “effectuate a diminishment.” Id. (citations omitted).
For example, in *Rosebud Sioux Tribe v. Kneip*, the United States Supreme Court held that the language of the surplus land acts opening the Rosebud Indian Reservation expressed congressional intent to diminish the reservation boundaries even though Congress had rejected a version of the act which promised an outright fixed sum as compensation and instead adopted a policy to pay the Indians for their lands only as money was received from the settlers. Similarly, the acts opening the Uintah Reservation did not guarantee a fixed sum as compensation for all of the lands opened to non-Indian settlement. Instead the acts provided that the proceeds from the lands actually sold to homesteaders would be advanced to the Indians after the United States was reimbursed for expenses incurred in effectuating the opening.

In *Perank*, the Utah Supreme Court noted that “[s]tatutory language that opens reservation lands to public entry and ‘restores’ those lands to the ‘public domain’ has ... been recognized in a number of Supreme Court cases to effectuate a diminishment of reservation boundaries as to such lands.” The first of these cases, *Seymour v. Superintendent of Washington State Penitentiary*, dealt with the status of the Colville Indian Reservation. The Supreme Court stated that “[i]n 1892, the size of this reservation was diminished when Congress passed an Act providing that ... about one-half of the original Colville reservation, since commonly referred to as the ‘North Half’

It is undisputed that “cession-type language” manifests a congressional intent to diminish. The Utah Supreme Court quoted, as an example, the key language from *DeCoteau v. District County Court* where the Indians agreed to “cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in” the disputed lands. *Id.* (quoting *DeCoteau v. District County Court*, 420 U.S. 425, 445 (1973)). On the other hand, statutory language which merely “opens” unallotted reservation lands to settlement by non-Indians is not sufficient to show congressional intent to diminish the reservation. *Id.* (citations omitted).

69. 587-88, 592.
71. *Perank*, 191 Utah Adv. Rep. at 8. In addition to the cases discussed in the text, the *Perank* court also cited *Sioux Tribe of Indians v. United States*, 316 U.S. 317 (1942), which involved lands detached from the Sioux reservation by executive order and “restored to the public domain.” The Utah Supreme Court inferred that “[a]n implicit assumption of the opinion is that the land restored to the public domain was no longer subject to tribal jurisdiction and had been detached from the Reservation.” *Perank*, 191 Utah Adv. Rep. at 8. This case does little to bolster the court’s argument, however, because only Congress, not the executive branch, can disestablish or diminish a reservation. *Solem*, 465 U.S. at 470.
should be ‘vacated and restored to the public domain.’”73 Contrasting the 1892 Act with the 1906 Act which opened the “South Half” of the reservation to non-Indian settlement, the Seymour Court found no diminishment by the 1906 Act because “[n]owhere in the 1906 Act is there to be found any language similar to that in the 1892 Act expressly vacating the South Half of the reservation and restoring that land to the public domain.”74

In Rosebud Sioux Tribe v. Kneip, the Court stated in dicta that a portion of the Great Sioux Reservation had been terminated by an 1889 Act which “restored to the public” approximately one-half of the reservation lands.75 Justice Marshall agreed with the majority on this point, asserting that the language of the 1889 Act was an example of “‘clear language of express termination.”76 The Court followed a similar approach in DeCoteau v. District County Court77 where it framed the issue of diminishment as whether the reservation was “terminated and returned to the public domain.”78 The DeCoteau Court concluded that the 1891 Act in dispute—ratifying an agreement for relinquishment of “all claim, right, title and interest in and to all the unallotted lands”—terminated the reservation.79 In support of this conclusion, the Court stated that the 1891 Act was analogous to the Act in Seymour “which plainly ‘vacated’ and restored ‘to the public domain’ the northern portion of the Colville Reservation.”80

73. Id. at 354 (emphasis added).
74. Id. at 355 (emphasis added).
75. 430 U.S. 584, 589 & n.5 (1977) (citation omitted).
76. Id. at 618 (Marshall, J., dissenting) (quoting Mattz v. Arnett, 412 U.S. 481, 504 n. 22 (1973)).
78. Id. at 426-27.
79. Id. at 427-28, 439 n.22.
80. Id. at 449 (quoting Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351, 355 (1962)). However, restoration language is not evidence of intent to diminish when the restoration language is not part of the operative language of the statute. In Solem v. Bartlett, 465 U.S. 463 (1984), the operative language of the surplus lands act at issue did not state that the unallotted lands would be returned to the public domain. The statute did, however, refer to the opened areas as being in the “public domain.” Solem, 465 U.S. at 475. The Supreme Court recognized that this reference undisputedly supported the view that the statute diminished the reservation but held that because the reference was in an isolated phrase it could not be dispositive. Id. at 474-75. The Perank court distinguished Solem on the grounds that “[t]he public domain language in Solem was located in an isolated section of the Act, was used only in a descriptive manner, and did not purport to restore any land to the public domain.” State v. Perank, 191 Utah Adv. Rep. 5, 8-9.
In light of these decisions it is somewhat surprising that the Tenth Circuit held in *Ute Indian Tribe* that "the phrase 'restore to the public domain' is not the same as a congressional state of mind to disestablish." The *Perank* court responded to *Ute Indian Tribe* by noting that a more recent Tenth Circuit decision, *Pittsburg & Midway Coal Mining Co. v. Yazzie*, had "revisited the issue of the legal meaning of the phrase 'restore to the public domain.'" The *Yazzie* court concluded:

[F]ederal court cases reveal that neither Congress, the courts, nor Indian tribes themselves have insisted that restoration language be accompanied by more explicit cancellation language. Rather, they have used or accepted simple, operative restoration language as language of reservation termination in many situations. We have found no case where operative restoration language was not accepted as language of termination.

In *Yazzie*, the Tenth Circuit itself noted that the conclusion in *Ute Indian Tribe* was "unexamined and unsupported in the opinion."

**B. Surrounding and Subsequent Events**

Even if the statutory language does not mandate diminishment, congressional intent to diminish may be inferred from events surrounding the passage of the surplus land act. The *Perank* court argued that the Uintah Reservation was opened by the 1902 Act and that the operative language of that act was precisely suited to diminishment. Since the express language is determinative of congressional intent, the court found it unnecessary to consider surrounding events in the context of evidence of intent to diminish. Nevertheless, a review of surrounding and subsequent events shows some support of a finding of diminishment.

(July 17, 1992).

82. 909 F.2d 1387 (10th Cir.), *cert. denied*, 111 S. Ct. 581 (1990).
84. *Yazzie*, 909 F.2d at 1404.
85. *Id.* at 1400.
87. In contrast, the Tenth Circuit in *Ute Indian Tribe* argued that the Uintah Reservation was opened exclusively by the 1905 Act which contained no restoration language and went on to conclude that the events surrounding passage of the act
At first examination, the negotiations with the Ute Tribe do provide some evidence of intent to disestablish. The 1902 Act required the consent of the Indians before the reservation could be allotted and the surplus lands opened for settlement. The Act was amended in 1903 to allow the opening of the reservation without the Indians’ consent, although their consent was to be solicited. Inspector James McLaughlin of the Bureau of Indian Affairs met with the Indians in the spring of 1903 to obtain the consent requested but not required by the 1903 Act. He explained to the Indians: “You say that line is very heavy and that the reservation is nailed down upon the border . . . . But Congress has provided legislation which will pull up the nails which hold down that line and after next year there will be no outside boundary line to this reservation.” Inspector McLaughlin clearly spoke in terms of disestablishment. However, he reported to the Secretary of Interior that the Indians were “unanimously opposed to the opening of their reservation under the provisions of the Act.” Thus there was no agreement for Congress to ratify, and congressional intent to diminish the reservation cannot be inferred from the negotiations with the tribe.

Subsequent actions and policies toward a particular reservation, including the way the surplus lands are treated by Congress, the executive branch, and local judicial authorities, might also be used to infer congressional intent. In 1906 Congress extended the time for homesteaders to establish a residence on opened lands and specifically referred to the unallotted lands as “heretofore a part of the Uinta [sic] Indian Reservation.” A 1912 Act also referred to the surplus lands as “land which was formerly a part of the Uintah Indian Res-

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did not support a finding that the act disestablished or diminished the reservation. Ute Indian Tribe v. Utah, 773 F.2d 1087, 1088-89 (10th Cir. 1985) (en banc), cert. denied, 479 U.S. 994 (1986).

90. Id. See supra part III.A.
Two other acts, one in 1910 and one in 1911, referred to "lands within the ceded Uintah Indian Reservation." These subsequent acts provide some evidence that Congress considered the reservation boundaries diminished by sale of the surplus lands.

In a 1905 Presidential Proclamation, President Theodore Roosevelt declared that the unallotted lands in the Uintah Reservation "shall be restored to the public domain." A 1906 Presidential Proclamation referred to "the former Uintah Indian Reservation in Utah" and declared that a small parcel of the tribal grazing reserve was "restored to the public domain." Action taken by the Secretary of Interior also provides evidence of diminishment. In 1934 Congress authorized the Secretary "to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened." The Secretary responded in 1945 by issuing an order that "added to and made a part of the existing reservation" 217,000 acres of opened lands which had been within the original Uintah Reservation boundaries. Had the reservation merely been opened for settlement rather than diminished, the status of these lands as part of the reservation would not have been affected. By "adding" these lands to the reservation the Secretary acknowledged that they had once been removed from the reservation.

Although not dispositive, two examples of treatment of the opened areas by local judicial authorities support a finding of diminishment. Sowards v. Meagher, a case decided shortly after the Uintah Reservation was opened, involved a dispute over a filing for appropriation of water rights to irrigate reservation lands which had been opened for settlement. In Sowards, the Utah Supreme Court took judicial notice that the unallotted lands of the reservation had been "restored to the public domain" by the 1902 Act. In United States v. Boss, the defendant was prosecuted for introducing liquor

101. 108 P. 1112 (Utah 1910).
102. Id. at 1114.
103. 160 F. 132 (D. Utah 1906).
into Indian country. The United States District Court for the District of Utah dismissed the charges for lack of jurisdiction because the alleged offense occurred on unallotted lands after the opening of the reservation and was therefore not in Indian country as required by the statute.\(^\text{104}\)

The contemporaneous and subsequent treatment of the unallotted opened lands by Congress, the executive branch and local judicial authorities, while not dispositive, support a determination that the clear statutory language shows congressional purpose to diminish.

C. **De Facto Diminishment**

On a pragmatic level, the Court has recognized that “who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land Act diminished a reservation.”\(^\text{105}\) This is true, in part, because when an area is predominantly used or populated by non-Indians, “finding that the land remains Indian country seriously burdens the administration of state and local government.”\(^\text{106}\) The recognition of the actual state of things in determining whether a state may exercise jurisdiction over Indian territory has been consistently recognized. As early as 1832, Justice McClean in a concurring opinion asserted that “[i]f a tribe of Indians shall become so degraded or reduced in numbers, as to lose the power of self government, the protection of the local law, of necessity, must be extended over them.”\(^\text{107}\) This same concept was reiterated in *Solem* when the Court declared that diminishment may have occurred when an “area has long since lost its Indian character.”\(^\text{108}\)

At the time Congress enacted the allotment policy and the surplus land legislation, the common assumption was that Indian reservations were a thing of the past. Indeed, the Supreme Court has acknowledged that, “[c]onsistent with prevailing wisdom, Members of Congress voting on the surplus land

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104. *Id.* at 134.
106. *Id.* at 471 n.12.
Acts believed to a man that within a short time—within a generation at most—the Indian tribes would enter traditional American society and the reservation system would cease to exist.109 Thus, it would be reasonable to conclude that Congress intended diminishment and disestablishment by the Dawes Act110 and each accompanying surplus land act.

However, this conclusion does not end the inquiry because of the federal government’s trustee relationship with the Indians. This relationship leads to “the general rule that ‘[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.’”111 As a result, a general intent to terminate or diminish cannot be implied and every surplus land act must be individually examined to ascertain congressional intent.

The clash between the goals of the allotment policy and Congress’s trustee responsibilities has created an enigma. Congress did not define reservation boundaries in the various surplus land acts because it believed that the reservations would cease to exist; yet each act must be examined to determine whether Congress intended the boundaries to change. Because of the difficulties inherent in divining congressional intent in this situation, de facto diminishment is a significant pragmatic indicator of whether the boundaries of the reservation have been diminished. Although “[r]esort to subsequent demographic history is . . . an unorthodox . . . method of statutory interpretation, . . . in the area of surplus land Acts, where various factors kept Congress from focusing on the diminishment issue, . . . the technique is a necessary expedient.”112

For example, in support of its finding that the Cheyenne River Sioux Reservation had not been diminished, the Solem Court noted that the opened area had not lost its Indian character.113 Very few homesteaders settled in the opened areas and a strong tribal presence remained. At the time of the litigation, two-thirds of the enrolled members of the tribe lived in the opened area and the seat of tribal government—where most

109. Id. at 468.
110. See supra note 7 and accompanying text.
113. Id. at 480.
important tribal activities take place—was in the opened area.\textsuperscript{114}

This situation can be contrasted with the Rosebud Sioux Reservation. In \textit{Rosebud Sioux Tribe v. Kneip},\textsuperscript{115} the Court held that the boundaries of the reservation had been diminished and recognized that the State of South Dakota had consistently exercised jurisdiction over the disputed area which was "over 90\% non-Indian, both in population and in land use."\textsuperscript{116} Thus, the area had lost its Indian character. Similarly, in \textit{DeCoteau v. District County Court},\textsuperscript{117} the Court held that the Lake Traverse Indian Reservation had been terminated.\textsuperscript{118} The population of the former reservation consisted of 3,000 tribal members and 30,000 non-Indians.\textsuperscript{119} Only fifteen percent of the original reservation land was owned in various "Indian trust allotments" scattered randomly throughout non-Indian owned land.\textsuperscript{120}

Although the United States Supreme Court has found this to be an important factor, the possibility of de facto diminishment of the Uintah Reservation was not even addressed by the Tenth Circuit and was relegated to a footnote in the \textit{Perank} decision.\textsuperscript{121} The disputed area of the Uintah-Ouray Reservation has lost its Indian character. Approximately 18,000 non-Indians currently live in the area that the \textit{Perank} court decided had been disestablished.\textsuperscript{122} Only 300 Indians, not all of whom are members of the Ute tribe, live in this same area.\textsuperscript{123} The Ute Tribe has about 1,500 enrolled members, nearly all of whom live on trust lands and not in the disputed area.\textsuperscript{124} The tribal seat of government is located on trust lands at Fort Duchesne.\textsuperscript{125} The fact that the opened portion of the Uintah Reservation has lost its Indian character is an important element weighing in favor of a finding of diminishment.

\begin{itemize}
\item \textsuperscript{114} Id.
\item \textsuperscript{115} 430 U.S. 584 (1977).
\item \textsuperscript{116} Id. at 605.
\item \textsuperscript{117} 420 U.S. 425 (1975).
\item \textsuperscript{118} Id. at 449.
\item \textsuperscript{119} Id. at 428.
\item \textsuperscript{120} Id.
\item \textsuperscript{121} State v. Perank, 191 Utah Adv. Rep. 5, 19 n.10 (July 17, 1992).
\item \textsuperscript{122} Id.
\item \textsuperscript{123} Id.
\item \textsuperscript{124} Id.
\item \textsuperscript{125} Id.; Ute Indian Tribe v. Utah, 773 F.2d 1087, 1105 (10th Cir. 1985) (Seth, J., dissenting), \textit{cert. denied}, 479 U.S. 994 (1986).
\end{itemize}
The controversy over the exercise of state jurisdiction in parts of the original Uintah Reservation was rekindled by the Utah Supreme Court's decision in *Perank*. If the United States Supreme Court decides to hear *State v. Hagen*, it is likely to conclude that the reservation has been diminished. First, the express language of the statute allotting lands to tribal members and opening surplus lands for settlement demonstrates that Congress intended to diminish the reservation. The operative statutory phrase, "restore to the public domain," is clear evidence that Congress intended to terminate the reservation status of the lands which were thereby restored. Second, a finding of diminishment is supported by contemporaneous and subsequent treatment of the area by Congress, the executive branch and judicial authorities, although these actions are too ambiguous to be decisive. Third, the disputed lands have lost their Indian character. De facto diminishment is a powerful, practical reason that the state, rather than the tribe or the federal government, should have jurisdiction over the disputed area.

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